No. 16-1094

IN THE
Supreme Court of the United States

REPUBLIC OF SUDAN,

Petitioner,

v.

RICK HARRISON, ET AL.,

Respondents.

On Petition for a Writ of Certiorari
to the United States Court of Appeals
for the Second Circuit

BRIEF OF *AMICI CURIAE* INTERNATIONAL LAW PROFESSORS IN SUPPORT OF PETITION FOR A WRIT OF CERTIORARI

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QUESTION PRESENTED

Whether the Second Circuit erred by holding — in direct conflict with the D.C., Fifth, and Seventh Circuits and in the face of an amicus brief from the United States — that plaintiffs suing a foreign state under the Foreign Sovereign Immunities Act may serve the foreign state under 28 U.S.C § 1608(a)(3) by mail addressed and dispatched to the head of the foreign state's ministry of foreign affairs "via" or in "care of" the foreign state's diplomatic mission in the United States, despite U.S. obligations under the Vienna Convention on Diplomatic Relations to preserve mission inviolability.

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INTEREST OF AMICI CURIAE[1]

Amici curiae listed in the Appendix are law professors and scholars at U.S. law schools who teach, research, and write about international law, both public and private. They share a common view that United States courts must properly apply international treaties to which the United States is a party, thereby adhering to its international legal obligations.

INTRODUCTION

This case involves a $314 million default judgment rendered against a foreign sovereign based upon two crucial findings by the Second Circuit: (1) that a foreign embassy is a proper conduit for service of process under the Foreign Sovereign Immunities Act ("FSIA"), 28 U.S.C. § 1608(a)(3); and (2) that acceptance of a mail parcel by an embassy's mail room constitutes "consent of the head of the mission" to receive service of process under the Vienna Convention on Diplomatic Relations ("VCDR"), 23 U.S.T. 3227, TIAS 7502 (1972). Each of these findings creates a serious circuit split, and jeopardizes long-held principles of international law and diplomacy critical to the foreign policy of the United States. *Amici curiae* submit this brief to

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[1] Pursuant to Supreme Court Rule 37.6, counsel for *amici* states that no counsel for a party authored this brief in whole or in part, and that no person other than *amici* or their counsel made a monetary contribution to the preparation or submission of this brief. The parties were notified 10 days prior to the filing of this brief pursuant to Supreme Court Rule 37.2 and have consented to its filing. Letters of consent to the filing of this brief have been lodged with the Clerk of the Court.

elaborate on the reasons why the conflict among the circuit courts on these issues is an important and troubling one that merits resolution by this Court.

While conceding that service of process *on* an embassy is disallowed by the FSIA, the Second Circuit held that service of process *via* an embassy is perfectly fine. Pet. App. 105a-106a. The FSIA, however, provides that service on a foreign state under 28 U.S.C. § 1608(a)(3) must be made by "any form of mail requiring a signed receipt, to be addressed and dispatched by the clerk of the court to the head of the ministry of foreign affairs of the foreign state concerned." U.S. courts require "strict adherence" to these terms when serving a foreign sovereign. *See Transaero, Inc. v. La Fuerza Aerea Boliviana*, 30 F.3d 148, 154 (D.C. Cir. 1994).

But any service of process on a foreign sovereign must also comply with the VCDR, article 22(1) of which provides that:

> [t]he premises of [a diplomatic] mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission.

This inviolability of diplomatic missions is a fundamental and longstanding principle of international law. The Second Circuit's decision to allow service of process *via* an embassy is unprecedented and represents a serious erosion of this principle, impairing the performance of diplomatic functions and impinging upon the dignity of foreign embassies in the United States, contrary to the text, practice, and purpose of the VCDR.

Customary international law instead requires that service be made upon the Ministry of Foreign Affairs of the served state, and not upon an embassy of that state.

Further, while the Second Circuit conceded that "consent of the head of the mission" was necessary to overcome the mission's inviolability under the VCDR, it found that the "Embassy's acceptance of the service package *surely constituted* 'consent.'" Pet. App. 107a (emphasis added). However, the "head of the mission" is a defined term in the VCDR, denoting the foreign sovereign's Ambassador or *chargé d'affaires* (an individual who heads an embassy in the absence of the ambassador). VCDR, art. 1(a), 14. Because there is no evidence in this case that the "head of the mission" was ever made aware of the service package, much less consented to the embassy's receipt of service, the premises of the mission remained inviolable, and no delivery of service could properly be made on it. The Second Circuit's decision to the contrary, which infers "consent" from a mail room employee's "acceptance of the service package," is unprecedented, dangerous, and creates a circuit split with other courts of appeals that have considered similar language in other international treaties.

The Second Circuit—which is home to numerous diplomatic missions, foreign consulates, trade missions, and missions to the United Nations—is out of step both with other Circuits and with the VCDR on these issues. This Court should take up the petition and correct the decision below to bring the United States in line with generally accepted international rules and practice.

ARGUMENT

I. THE VIENNA CONVENTION ON DIPLOMATIC RELATIONS DISALLOWS SERVICE OF PROCESS ON A STATE VIA ITS EMBASSY.

The VCDR, adopted in 1961 and ratified by the United States in 1972,[2] represents an essential instrument for the conduct of foreign relations. Among other things, it codified what had long been an established tenet of customary international law, namely the principle of diplomatic immunity from civil and criminal proceedings.[3] Virtually every country on earth is a party to the VCDR.[4]

The VCDR states that it is intended to "contribute to the development of friendly relations among nations," and that the privileges and immunities that it provides help to "ensure the efficient performance of the functions of diplomatic missions as representing states." VCDR, preamble. Article 3 of the VCDR identifies five essential functions provided by diplomatic missions:

> (a) Representing the sending State in the receiving State;

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[2] 23 UST 3227, TIAS 7502 (1972).

[3] Anderson, Matthew Smith, *The Rise of Modern Diplomacy 1450-1919*, at 53-54 (Longman, 1993).

[4] 191 states are party to the VCDR. *See* United Nations Treaty Collection, *Vienna Convention on Diplomatic Relations* https://treaties.un.org/pages/ViewDetails.aspx?src=TREATY&mtdsg_no=III-3&chapter=3&clang=_en.

(b) Protecting in the receiving State the interests of the sending State and of its nationals, within the limits permitted by international law;

(c) Negotiating with the Government of the receiving State;

(d) Ascertaining by all lawful means conditions and developments in the receiving State, and reporting thereon to the Government of the sending State; and

(e) Promoting friendly relations between the sending State and the receiving State, and developing their economic, cultural and scientific relations.

The VCDR recognizes that respect for the privileges and immunities of diplomatic missions is essential in order for the sending state to properly perform these diplomatic functions. VCDR, preamble. For example, diplomatic agents enjoy complete immunity from the criminal jurisdiction of the host state, and immunity from all civil and administrative jurisdiction, except in narrow circumstances in which they are acting outside of their official capacity. *See* VCDR, art. 31(1).

Of particular relevance to the present case is the VCDR's guarantee that "[t]he premises of the mission shall be inviolable. The agents of the receiving State may not enter them, except with the consent of the head of the mission." VCDR, art.

22(1). As the U.S. State Department explains, no entry can be made without permission and consent, "even to put out a fire."[5]

Moreover, the VCDR places a "special duty" on the host state to "take all appropriate steps to protect the premises of the mission against any intrusion or damage and to prevent any disturbance of the peace of the mission or impairment of its dignity." VCDR, art. 22(2).

U.S. courts are cognizant that service of process upon a diplomat or diplomatic mission "might impair the performance of diplomatic functions or otherwise impinge upon a diplomat's dignity." *See Tachiona v. United States*, 386 F.3d 205, 223-224 (2d Cir. 2004) (rejecting service on diplomatic personnel). For example, in the *Hellenic Lines* case, which arose before the FSIA was enacted, the D.C. Circuit rejected service on an ambassador on behalf of "his sending state." *Hellenic Lines, Ltd. v. Moore*, 345 F.2d 978, 980 (D.C. Cir. 1965). The D.C. Circuit found that such service "would prejudice the United States foreign relations and would probably impair the performance of diplomatic functions," and therefore concluded that "the purposes of diplomatic immunity forbid service in this case." *Id.* at 980-81.

In *Hellenic Lines*, the court agreed with the Department of State that diplomatic personnel would be "hampered in the performance of [their] duties if . . . [they] were diverted from the performance of

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[5] *See* U.S. State Department, *What is a U.S. Embassy?*, https://diplomacy.state.gov/discoverdiplomacy/diplomacy101/places/170537.htm (last visited Apr. 8, 2017).

[their] foreign relations functions by the need to devote time and attention to ascertaining the legal consequences, if any, of service of process having been made, and to taking such action as might be required in the circumstances." *Id.* at 980 n.5. Further, "[t]he sending state might well protest to the Department that the United States had failed to protect the person and dignity of its official representative" and that "[o]ther governments might interpret the incident as meaning that the Government of the United States had decided, as a matter of policy, to depart from what they had considered a universally accepted rule of international law and practice." *Id.*

While the *Hellenic Lines* case entailed service by a United States Marshal, a concurring judge observed that "although service of process on an ambassador by registered mail might avoid some of the problems inherent in personal service by a marshal, it would raise others." *Id.* at 982-83 (Washington, J., concurring) (quotation omitted).

As Petitioner and the United States have already noted, such problems include the threat to foreign relations and to U.S. interests posed by the Second Circuit's decision in this case. *See* Pet. at 5; Pet. App. at 144a-145a. By allowing service of process to be mailed to an embassy, the Second Circuit's decision results in an uninformed and non-consensual waiver of the mission's inviolability. Further, foreign diplomatic personnel will be required to divert time and attention from their diplomatic duties to determine what they should do with a package mailed to a (former) Minister of Foreign Affairs who is not resident at the embassy.

It is unclear what an embassy is to do upon being faced with service of process. It may reject the mailing, Pet. App. at 107a, but would have to do so without knowing its contents. As the Second Circuit found, once receipt has been acknowledged, diplomatic personnel are then "expected" to deliver the mailing to the Minister of Foreign Affairs, including potentially placing the service package into the diplomatic pouch. Pet. App. at 98a & n.3.

The burden on the embassy is exacerbated by the very circuit split upon which this amicus brief is predicated. If the mailing comes from a court in the D.C., Fifth, or Seventh Circuits, then it should be treated as ineffective. *See, e.g., Barot v. Embassy of the Republic of Zambia*, 785 F.3d 26, 29-30 (D.C. Cir. 2015) ("[T]he [FSIA] require[s]" service "at the Ministry of Foreign Affairs in [the foreign country]" rather than "at the Embassy in Washington, D.C."). If the mailing comes from a court in the Second Circuit, the embassy clearly is under a different obligation, namely to forward the package and the foreign state has a responsibility to appear. If the mailing comes from another circuit, it is unclear how the embassy should treat the package. With hundreds of millions or billions of dollars in default judgments on the line, embassy personnel will almost certainly need to retain U.S. counsel simply to determine what they should do with the service package, thereby distracting them from their normal foreign policy duties. Without a clear ruling from this Court, foreign states may be subject to unintended legal consequences in pending litigation based on their actions or failure to act.

Ultimately, embassies would need to become far more careful about accepting mail deliveries, and may end up adopting specific policies limiting the mail that they are willing to receive. For embassies to limit their communications with the host state in order to avoid complicated issues of service—or worse yet, massive default judgments—would undermine their ability to perform their diplomatic mission.

As the United States further observed in its *amicus* brief below, the Second Circuit's decision also impinges upon the dignity of the diplomatic mission, as it "dictate[s] the internal procedures of the embassy of another sovereign" by "instructing it to use its [diplomatic] pouch to deliver items to its officials on behalf of a third party." Pet. App. at 144a. Diplomatic agents are not couriers or agents for delivery of parcels to their home country, and should not be required to act as such by U.S. law.

That service on a foreign state via its embassy is not in accord with the text or the principles of the VCDR is further supported by the international consensus rejecting any attempt to serve process on a foreign state via its embassy or diplomatic personnel. *See, e.g., Kuwait Airways Corp. v. Iraqi Airways Co. & Republic of Iraq* [1995] 1 WLR 1147 (United Kingdom's highest court rejecting service on the Iraqi embassy with a "request . . . to forward the writ . . . to the Iraqi Ministry of Foreign Affairs"); *Sistem Mühendislik Insaat Sanayi Ve Ticaret Anonim Sirketi v. Kyrgyz Republic*, 126 O.R. (3d) 545; 2015 ONCA 447 (Canadian appellate court rejecting service on the Kyrgyz Embassy and noting that "service on an embassy is not available as a means of

effecting service on a foreign state"); *see also Sebina v. South African High Commission* 2010 3 BLR 723 IC (Botswana court rejecting personal service ostensibly accepted by the South African High Commission[6]); *Village Holdings Sdn. Bhd. v. Her Majesty the Queen in Right of Canada* [1988] 2 MLJ 656 (Malaysian Court rejecting personal service upon the Queen by leaving papers at the Canadian High Commission).

Significantly, neither Plaintiff in this case nor the Second Circuit has cited to *any* state party to the VCDR that allows service of process on a foreign state via its embassy. Sudan and the United States are both parties to the VCDR, and both appear to agree that service of process via an embassy is not allowed by the treaty. As this Court has previously explained, "[w]hen the parties to a treaty both agree as to the meaning of a treaty provision, and that interpretation follows from the clear treaty language, *we must*, absent extraordinarily strong contrary evidence, *defer to that interpretation*." *Sumitomo Shoji Am. v. Avagliano*, 457 U.S. 176, 185 (1982) (emphasis added).

Requiring foreign embassies to deal with U.S. service of process law and act as couriers or agents for the delivery of legal documents is not necessary, is detrimental to the important purposes that diplomatic missions serve in the United States, and undermines one of the fundamental principles of international diplomacy—the inviolability of diplomatic missions. It also diverges from the

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[6] Commonwealth countries refer to their diplomatic missions as High Commissions rather than embassies.

understanding of the parties to the VCDR, who agree that service via an embassy is not allowed. The United States also has a strong interest in treating foreign embassies as it wants its own embassies treated abroad, and if the Second Circuit decision is allowed to stand, it threatens to allow service of process by foreign courts on United States embassies around the world.

There is a better way. As explained further below, customary international law recognizes the proper method of serving foreign sovereigns—a method that does not interfere in the role of diplomatic missions.

II. CUSTOMARY INTERNATIONAL LAW SPECIFICALLY CONTEMPLATES SERVICE OF PROCESS ON A STATE'S MINISTRY OF FOREIGN AFFAIRS.

In drafting the FSIA, Congress knowingly codified the principles of sovereign immunity "recognized in international law." *See* H.R. Rep. No. 94–1487, at 2 (1976), *as reprinted in* 1976 U.S.C.C.A.N. 6604, 6605 (recognizing that the principles of sovereign immunity in the FSIA were "regularly applied against the United States in suits . . . in foreign courts").

The customary international law of diplomatic immunity has more recently been reaffirmed in prominent international law instruments. These instruments include the United Nations Convention on Jurisdictional Immunities of States and their Property. G.A. Res. 59/38, Annex, U.N. Doc. A/RES/59/38 (Dec. 2, 2004) ("the 2004 Convention"); *see also Wallishauser v. Austria*, Application No.

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156/04, Judgment, 19 November 2012 (ECtHR) (finding that the 2004 Convention constitutes customary international law binding on both Austria and the United States for purposes of service of process on a foreign sovereign). While the 2004 Convention itself has not yet entered into force, it provides guidance as to the customary international law requirements for service of process on foreign sovereigns. Article 22 of the Convention, much like the FSIA in 28 U.S.C. § 1608(a)(1) and (2), allows for service by special arrangement or international convention. But if neither of these means is available, then the 2004 Convention contemplates "transmission through diplomatic channels *to the Ministry of Foreign Affairs* of the State concerned," and provides that "Service of process . . . is deemed to have been effected *by receipt of the documents by the Ministry of Foreign Affairs*." 2004 Convention, art. 22(1)(c)(i),(2) (emphasis added).

The 2004 Convention was based upon earlier work done by the International Law Commission, which in 1991 published draft articles on jurisdictional immunities.[7] The commentary to the ILC Draft Articles—which are substantially similar to the 2004 Convention—explains that "[s]ince the time of service of process is *decisive* for practical purposes . . . in the case of transmission through diplomatic channels *or by registered mail*, service of process is deemed to have been effected on the day of receipt of the documents *by the Ministry of Foreign Affairs*." ILC Yearbook, 1991, Vol. II, Part 2, p. 60, §

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[7] *See* ILC Draft Articles on Jurisdictional Immunities of States and Their Property, ILC Yearbook, 1991, Vol. II, Part 2, p. 60, §§ 1-3.

3 (emphasis added). The commentary further notes that "too liberal or generous a regime of service of process . . . could result in an *excessive number of judgments in default* of appearance by the defendant State." *Id.* § 1 (emphasis added).

Customary international law thus recognizes that, absent other specifically agreed upon means, the only effective way to serve process on a foreign sovereign—including by "registered mail"—is by service on "the Ministry of Foreign Affairs." This is in accord with the FSIA, which requires that the registered mail be "addressed and dispatched . . . to the head of the ministry of foreign affairs of the foreign state concerned." 28 U.S.C. § 1608(a)(3).

As this Court long ago explained, "an act of Congress ought never to be construed to violate the law of nations if any other possible construction remains." *Murray v. The Schooner Charming Betsy*, 6 U.S. 64, 81 (1804). Thus, even if the Second Circuit were correct that the FSIA is ambiguous as to where a service package addressed to "the head of the ministry of foreign affairs" may be sent, customary international law—the "law of nations"—clearly provides that it should be sent to the Ministry of Foreign Affairs, and that service is only effective once it has been received by that Ministry. This makes eminent sense both in terms of the plain language of the FSIA and as an effective means of avoiding an "excessive number of judgments in default" against foreign governments.

Neither the 2004 Convention nor the ILC Draft Articles even mention the possibility of serving process on a foreign state via that state's embassy. They thereby reaffirm the VCDR's prohibition on the

use of embassies for service of process upon a foreign state.

In order to uphold the very purpose of diplomatic missions, avoid violating customary international law, and give effect to the parties' interpretation of the VCDR, this Court should therefore grant the petition, and ultimately find that serving process via an embassy is in violation of the VCDR and the United States' international obligations.

III. SERVICE OF PROCESS ON AN EMBASSY REQUIRES "CONSENT OF THE HEAD OF THE MISSION."

In its opinion on rehearing, the Second Circuit acknowledged that the VCDR expressly bars host state agents from entering the premises of a diplomatic mission "except with the consent of the head of the mission." Pet. App. at 107a (quoting VCDR, art. 22(1)). However, the Second Circuit determined that the "Embassy's *acceptance of the service package surely constituted 'consent'*." *Id.* (emphasis added). This conclusion is unjustified under the VCDR.

The VCDR does not simply require some form of "consent;" it specifically requires the consent "*of the head of the mission.*" *See* VCDR, art. 22(1) (emphasis added). The "head of the mission" is a specific individual defined by the text of the VCDR as the person "charged by the sending State" with that duty. VCDR, art. 1(a). Specifically, the "head of the mission" may only take up his post after "present[ing] his credentials" to the receiving State. VCDR, art. 13(1). "Heads of mission" are explicitly

identified as one of three classes: "ambassadors," "envoys," or "*chargés d'affaires*." VCDR, art. 14.[8]

The VCDR contains guidance regarding the "members of the staff of the mission," which includes the "members of the diplomatic staff, of the administrative and technical staff and of the service staff." VCDR, art. 1(c). The "administrative staff" is employed in the "administrative . . . service of the mission." *Id.*, art. 1(f). Only the "diplomatic staff," however, "should in principle be of the nationality of the sending State." *Id.*, art. 8(1). The U.S. State Department explains that "it is necessary to hire citizens from the host country to fill jobs at both embassies and consulates,"[9] and fills positions, such as "Mailroom Clerk," in its own missions abroad with host country nationals.[10] Thus, the individual receiving the mail is not the "head of the mission" or even a member of the diplomatic staff, and possibly not a national of the foreign state at all. Such an individual is neither competent nor authorized to make decisions regarding acceptance of legal process on behalf of the foreign state.

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[8] Other heads of mission of equivalent rank are also allowed by the VCDR, including nuncios and internuncios from the Holy See, High Commissioners within the Commonwealth, etc.

[9] U.S. State Department, *What is a U.S. Embassy?*, https://diplomacy.state.gov/discoverdiplomacy/diplomacy101/places/170537.htm (last visited Apr. 8, 2017).

[10] See, e.g., *United States Mission Vacancy Announcement: Mailroom Clerk*, https://ca.usembassy.gov/wp-content/uploads/sites/27/2016/04/16-44-Mailroom-Clerk-Toronto.pdf (last visited Apr. 8, 2017) (offering a position as a "Mailroom Clerk" in charge of "unclassified mail" at the U.S. Embassy in Ottawa, Canada to host-country nationals).

Determining that a mailroom clerk's consent suffices for the "consent of the head of the mission"—as the Second Circuit's decision does—may lead to significant mischief, as host state agents may easily get implied "consent" from low-level employees to enter onto embassy premises. It is to prevent such abuses that the VCDR specifies that the "consent" must come from the "head of the mission." Requiring a specific individual's consent avoids an unknowing waiver of the mission's inviolability.

The Second Circuit's decision also conflicts with circuit courts that have considered similarly worded treaties. Both the Eleventh and D.C. Circuits, for example, have considered similar language under an international treaty between Austria and the Organization of the Petroleum Exporting Countries ("OPEC") that allows service only with the "consent of . . . the [OPEC] Secretary General." *See Prewitt Enters. v. OPEC*, 353 F.3d 916, 923 (11th Cir. 2003); *Freedom Watch, Inc.* v. *OPEC*, 766 F.3d 74 (D.C. Cir. 2014).[11] In *Prewitt*, as in this case, the pleadings were sent by "registered mail, return receipt requested." *Prewitt*, 353 F.3d at

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[11] As the Eleventh Circuit noted, similar treaty provisions requiring consent by a specified individual are found in Headquarters Agreements between sovereign states and international organizations around the world. *Prewitt*, 353 F.3d at 923 n.12. One such example is the United Nations Headquarters Agreement, which states that "The headquarters district shall be inviolable. . . . The service of legal process, including the seizure of private property, may take place within the headquarters district *only with the consent of* and under conditions approved by *the Secretary-General*." *See* United Nations Headquarters Agreement, Art. III, § 9, *available at* 22 U.S.C. § 287 (emphasis added).

919. "The pleadings were signed for, stamped 'received' by OPEC's Administration and Human Resources Department, and forwarded to the Director of OPEC's Research Division as well as other departments including the Secretary General's office." *Id.* at 919-20. Possibly relying on the ineffective service, "the Secretary General decided that the OPEC Secretariat would not take any action with regard to the summons and complaint." *Id.* at 920. As in this case, when the defendant failed to appear, the trial court rendered a default judgment. *Id.* OPEC then made a special appearance to challenge service, and the Eleventh Circuit determined, based on the wording of the treaty, that the acceptance of a service mailing by OPEC did not constitute the "consent of . . . the [OPEC] Secretary General" and that service was therefore ineffective. *Id.* at 925.

The D.C. Circuit followed this reasoning in *Freedom Watch*, where the plaintiff attempted to deliver service "by hand to OPEC headquarters in Vienna, where an individual ostensibly accepted service." 766 F.3d at 77. The D.C. Circuit found that without the consent of OPEC's Secretary General, service was ineffective, despite the ostensible acceptance of a service package by an employee. *Freedom Watch*, 766 F.3d at 80.

In the *Hellenic Lines* case, the D.C. Circuit explained what "consent" in this context would require. As noted above, *Hellenic Lines* involved an attempt to serve an ambassador with a complaint against "his sending state." *Hellenic Lines, Ltd. v. Moore*, 345 F.2d 978, 980 (D.C. Cir. 1965). The D.C. Circuit noted that "an ambassador may be served if

Determining that a mailroom clerk's consent suffices for the "consent of the head of the mission"—as the Second Circuit's decision does—may lead to significant mischief, as host state agents may easily get implied "consent" from low-level employees to enter onto embassy premises. It is to prevent such abuses that the VCDR specifies that the "consent" must come from the "head of the mission." Requiring a specific individual's consent avoids an unknowing waiver of the mission's inviolability.

The Second Circuit's decision also conflicts with circuit courts that have considered similarly worded treaties. Both the Eleventh and D.C. Circuits, for example, have considered similar language under an international treaty between Austria and the Organization of the Petroleum Exporting Countries ("OPEC") that allows service only with the "consent of . . . the [OPEC] Secretary General." *See Prewitt Enters. v. OPEC*, 353 F.3d 916, 923 (11th Cir. 2003); *Freedom Watch, Inc.* v. *OPEC*, 766 F.3d 74 (D.C. Cir. 2014).[11] In *Prewitt*, as in this case, the pleadings were sent by "registered mail, return receipt requested." *Prewitt*, 353 F.3d at

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919. "The pleadings were signed for, stamped 'received' by OPEC's Administration and Human Resources Department, and forwarded to the Director of OPEC's Research Division as well as other departments including the Secretary General's office." *Id.* at 919-20. Possibly relying on the ineffective service, "the Secretary General decided that the OPEC Secretariat would not take any action with regard to the summons and complaint." *Id.* at 920. As in this case, when the defendant failed to appear, the trial court rendered a default judgment. *Id.* OPEC then made a special appearance to challenge service, and the Eleventh Circuit determined, based on the wording of the treaty, that the acceptance of a service mailing by OPEC did not constitute the "consent of . . . the [OPEC] Secretary General" and that service was therefore ineffective. *Id.* at 925.

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he consents to service," but posited that the burden of securing such consent "should rest on the party seeking service." *Id.* n.3. The concurrence noted that the plaintiff would need to make a "showing that the Ambassador has consented, or is authorized, to accept service on behalf of the government which he represents for diplomatic purposes in this country." *Id.* at 981-82 (Washington, J., concurring). The concurrence also stated that "informal inquiries" had been made as to "whether the Embassy of Tunisia would be willing to accept service of summons in this case," and determined that it was "unwilling to accept service of process." *Id.* at 982. Because consent was not forthcoming from the embassy, process could not be served on the foreign state via the embassy or its personnel. *Id.* at 983.

The Second Circuit's finding that acceptance of registered mail by a mailroom employee constitutes implied "consent" by the "head of the mission" is squarely at odds with the text of the VCDR, the holdings of *Prewitt* and *Freedom Watch*, and the dicta from *Hellenic Lines* that actual consent by the specified individual is required. Securing such consent prior to delivery would obviate many of the foreign policy concerns present in this case, as a senior diplomatic official from a foreign government would have agreed to service of process, and would be taking responsibility for ensuring service to the Minister of Foreign Affairs.

CONCLUSION

For the foregoing reasons, *amici curiae* international law professors support Petitioner Republic of Sudan's petition for certiorari, and respectfully request that the petition be granted.

Respectfully submitted,

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APPENDIX

APPENDIX A: LIST OF *AMICI CURIAE*[1]

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[1] Universities are mentioned only for identification purposes and not as an endorsement.